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## MST MARKETING SDN BHD v. KETUA PENGARAH KASTAM, JABATAN KASTAM DIRAJA MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID J
[JUDICIAL REVIEW NO: WA-25-104-16]
2 AUGUST 2017

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***REVENUE LAW:*** *Goods and services tax – Refund – Claim for – Whether goods were under category of which special refund was applicable – Whether goods owned by applicant – Whether information in claim for special refund was misrepresented – Whether claim for special refund rejected – Whether decision to reject claim for refund tainted with illegality and irrationality – Goods and Services Tax Act 2014, ss. 81, 124, 190 & 191(3)*

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The applicant was involved in the business of supplying gypsum board products. In its ordinary course of business, the applicant purchased stocks that were sourced from both international and domestic suppliers. The applicant was a taxable person under s. 20 of the Goods and Services Tax Act 2014 ('GST Act'). The applicant applied for a special refund to the respondent in respect of the sales tax paid for stock held in hand as of 31 March 2015 with a total claim of RM40,366.32 in respect of 62 goods purchased or imported by the applicant. The respondent notified the applicant that an audit would be conducted pursuant to the provisions and powers stated under s. 81 of the GST Act and ss. 106A and 106B of the Customs Act 1967. Subsequently, an audit was conducted at the applicant's business premise by the audit officers of the respondent. From the audit, it was discovered that there were information on the special refund claim provided by the applicant that was inaccurate. Hence, the respondent rejected the applicant's special tax refund application on the grounds that: (i) the goods claimed for a special refund were in the category of goods to which a special refund should not apply; and (ii) it was found that the goods claimed for a special refund were not owned by the applicant. Therefore, the applicant filed an application for judicial review against the respondent's decision on the following grounds pursuant to O. 53 r. 3(2) of the Rules of Court 2012: (i) illegality – the respondent's decision was *ultra vires*, illegal, void, unlawful, lack of jurisdiction and/or in excess of authority; (ii) irrationality/unreasonableness – that it was so unreasonable that no reasonable person could have come to that decision; and (iii) legitimate expectations – the respondent's decision notwithstanding the clear provisions stated in ss. 190 and 191 of the GST Act constituted a denial of the legitimate expectations of the applicant that the respondent would take cognizance of the said legal provisions. The applicant claimed that the respondent had erroneously and arbitrarily rejected the applicant's application for a special refund for sales tax paid pursuant to ss. 190 and 191 of the GST Act.

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**Held (dismissing application with costs):**

**(1)** Pursuant to s. 124(1) of the GST Act, the taxpayers have the option of filing for an application for review by the respondent or appealing to other courts. If the applicant had opted to file its appeal before the High Court, then the applicant was excluded from filing an application for review. There was nothing to prohibit the applicant under the GST Act to challenge the decision by the respondent in rejecting the applicant's application for special refund for sales tax paid. (paras 31 & 32)

**(2)** The applicant was registered as a person under s. 20 of the Act and was entitled to apply for a special refund under ss. 190 and 191 of the Act. However, s. 191(3) of the GST Act provides that the claimant shall not be entitled to a special refund and the officer of goods and services tax may refuse such claim where any information on the claim provided by the claimant is found to be false, inaccurate, misleading or misrepresented. In order to establish the claim to be correct and accurate, it must go through an audit exercise, which is a finding of fact or assessment on the documents to ensure that all application received for the special refund fulfils the requirement under s. 190 of the GST Act and to verify that all claims made for special refund are correct and accurate. (paras 48, 53 & 58)

**(3)** The audit was done and the respondent had followed their internal guidelines. Based on the audit, the respondent discovered the information in the claim for special refund submitted by the applicant on 30 September 2015 was misrepresented. The respondent had thus rejected the applicant's claim for the special refund and had explained the rejection. Therefore, the respondent's decision could not be said to be tainted with illegality and irrationality. (paras 53-55 & 59)

**(4)** The applicant had failed to fulfil the requirements in s. 191(3) of the GST Act. Therefore, the applicant's claim for the special refund had been correctly rejected. In the circumstances, the issue of legitimate expectation did not arise. (para 62)

**Case(s) referred to:**

*Alcatel-Lucent Malaysia Sdn Bhd & Anor v. Ketua Pengarah Hasil Dalam Negeri [2011] 4 CLJ 142 HC* ***(refd)***

*Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223* ***(refd)***

*Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC* ***(refd)***

*Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374* ***(refd)***

*Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC* ***(refd)***

*Krishnandas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC* ***(refd)***

*Malaysia Airline System Bhd v. Wan Sa'adi Wan Mustafa [2015] 1 CLJ 295 FC* ***(refd)***

*National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue [1993] 4 CLJ 339 SC* ***(refd)***

A *R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***

*Uni-Charm (M) Sdn Bhd v Ketua Pengarah Kastam (Judicial Review No.: R2-25-208-11/14) (Unreported)* ***(refd)***

**Legislation referred to:**

B Customs Act 1967, ss. 106A, 106B, 141N

Goods and Services Tax Act 2014, ss. 20, 81, 124(1), 190(1)(a), (b), (c), (d), (4), 191(3), Fourth Schedule

Income Tax Act 1967, s. 99(1)

Rules of Court 2012, O. 53 r. 3(2)

Sales Tax Act 1972, s. 31A

C *For the appellant - Jason Tan; M/s Lee Hishamuddin Allen & Gledhill*
*For the respondent - Haryati Ahmad; SFC*

*Reported by S Barathi*

D **JUDGMENT**

**Kamaludin Md Said J:**

**Introduction**

**[1]** This is the applicant's application for judicial review made pursuant E to O. 53 of the Rules of Court 2012 seeking the following reliefs:

(a) An order of *certiorari* to move into this court for the purpose of it being quashed; the decision of the respondent dated 10 March 2016, where the respondent had erroneously and arbitrarily rejected the applicant's application for a special refund for sales tax paid pursuant to ss. 190 and F 191 of the Goods and Services Tax Act 2014;

(b) A declaration that there is no legal basis for the respondent's decision in erroneously and arbitrarily rejecting the applicant's special refund application on the grounds that the goods claimed for a special refund are in the category of goods to which a special refund shall not apply and G it was found that the goods claimed for a special refund are not owned by the applicant;

(c) An order that the respondent shall refund all the taxes paid by the applicant pursuant to the applicant's special refund application, which H amounts to RM40,366.32 with interest accruing at the rate of 8% per annum on the said sum from the date of judgment of this court until the date where the sales tax is returned to the applicant by the respondent;

(d) That all necessary and consequential directions and orders be given;

I (e) That the costs of this application be costs in the cause; and

(f) All other and further reliefs which this court deems fit and proper.

**[2]** The following cause papers have been filed in this court, namely: A

(a) Application for judicial review dated 9 June 2016 ("the application);

(b) The statement filed pursuant to O. 53 r. 3(2) of the Rules of Court dated 9 June 2016;

(c) The applicant's affidavit in support affirmed by Chua Toong Pooi on 9 June 2016; B

(d) The respondent's affidavit in reply affirmed by Dato' Sri Khazali bin Haji Ahmad on 1 September 2016 (the respondent's affidavit in reply").

(e) The applicant's affidavit in reply affirmed by Chua Toong Pooi on 8 November 2016 ("the applicant's affidavit in reply"); C

(f) The respondent's affidavit in reply affirmed by Dato' Sri Khazali bin Haji Ahmad on 30 November 2016 ("the respondent's affidavit in reply 2");

(g) The applicant's affidavit in reply 2 affirmed by Chua Toong Pooi on 26 January 2017 ("the applicant's affidavit in reply"). D

**Salient Facts**

**[3]** The applicant is involved in the business of supplying gypsum board products. In its ordinary course of business, the applicant purchases stock that are sourced from both international and domestic suppliers. E

**[4]** The applicant is registered as a taxable person under s. 20 of the GST Act 2014 (Act 762).

**[5]** The applicant applied for a special refund to the respondent in respect of the sales tax paid for stock held in hand as of 31 March 2015 with a total claim of RM40,366.32 in respect of 62 goods purchased or imported by the applicant. F

**[6]** On 10 February 2016 the respondent notified the applicant that an audit would be conducted pursuant to the provisions and powers stated under s. 81 of the GST Act and ss. 106A and 106B of the Customs Act 1967. On 17 February 2016, an audit was conducted at the applicant's business premise by the audit officers of the respondent. G

**[7]** For audit purposes, a total of ten samples from the 62 stock keeping units (SKU) has been selected for this invoice with sales tax method, which involves 61.778% sampling. H

**[8]** From this audit, it was discovered that there are information on the special refund claim provided by the applicant that are inaccurate.

**[9]** *Vide* a letter dated 10 March 2016, the respondent rejected the applicant's special tax refund application on the following brief grounds: I

A (a) The goods claimed for a special refund are in the category of goods to which a special refund shall not apply; and

(b) It was found that the goods claimed for a special refund are not owned by the applicant.

B **[10]** *Via* the same letter, the respondent also inform that for further clarification, can be given by contacting a specified email and number.

**[11]** On 9 June 2016, the applicant filed an application for judicial review against the decision by the respondent dated 10 March 2016.

C **Applicant's Submission**

*Different Stock Count*

**[12]** The applicant submitted that the respondent had erroneously rejected the applicant's special refund application by failing to consider all relevant documentation and evidence submitted by the applicant. The respondent's D decision that the applicant did not have the same stock count when it conducted an audit at the applicant's office premise on 17 February 2016 is made without providing any evidence. It was argued on behalf of the applicant that the respondent had clearly erred in law from a starting position as the crux of its decision is that the applicant had a different stock count E when it conducted an audit on 17 February 2016. The applicant contended that its sales tax refund application was made based on the stock it held in hand on 1 April 2015 and as expressly listed in pp. 303 to 309 of exh. CTP11 of the applicant's affidavit in support.

**[13]** The applicant further contended that the audit conducted by the F respondent was only on 17 February 2016. In the circumstance, the respondent could not compare the stock count between 1 April 2015 and 17 February 2016. This is because, as the applicant, like all other businesses, would need to continuously sell its products. The stock count would definitely be different in that regard. The applicant had also furnished all G invoices for the sale of such stock between 1 April 2015 and 17 February 2016, as reflected in CTP15 of the applicant's affidavit in reply 2.

**[14]** The applicant submitted that pursuant to s. 190 of the GST Act, the refund application shall be made based on the stock held in hand on 1 April 2015 and not at any time after that. Therefore, the respondent's basis of using H the applicant's stock count on 17 February 2016 is clearly erroneous and illegal.

*Conditions For Sales Tax Refund*

**[15]** The applicant submitted that it's only bound by the conditions stated in ss. 190 and 191 of the GST Act and that the applicant had fulfilled the I requirement of these provisions as follows:

*Section 190 Of The Act*

(i) Section 190(1)(a) requires that the applicant be a registered person under s. 20 from the effective date ie, 1 April 2015. It is not disputed that the applicant is a registered person.

(ii) Section 190(1)(b) requires that the applicant on the effective date holds goods for the purposes of making a taxable supply. The applicant had submitted the special refund audit certificate as on 31 March 2015 held the goods for the purpose of making a taxable supply.

(iii) Section 190(1)(c) requires that the goods are taxable under the Sales Tax Act 1972 and that the sales tax has been charged to and paid by the applicant. The applicant had furnished the respondent with the invoices and payment vouchers for all the goods purchased. All the goods were taxed under the Sales Tax Act 1972. It is clearly indicated in the invoices that those goods were charged with sales tax. The applicant had also furnished the respondent all payment vouchers evidencing that the applicant had successfully made the payments which include sales tax.

(iv) Section 190(1)(d) requires that the applicant possess the relevant supplier's invoices proving that the claimant is the recipient for which sales tax has been charged or import documents proving that the applicant is the importer, consignee or owner for which sales tax has been paid. In respect of the 11 goods sourced from foreign suppliers, the applicant submitted that it had clearly furnished the respondent with the bills of lading and import invoices which proves that the applicant is the importer and the consignee of goods for which sales tax has been paid. As for the remaining 51 locally purchased goods, the applicant contended that it had also submitted to the respondent, invoices for all goods of which sales tax has been paid.

(v) Section 190(4) lists the categories of items to which special refund claim shall not apply. Since the applicant's goods were not capitalised at all material times, not used partially or incorporated into other goods, not held for hire or for other than business use or not for sale or exchange, not meant to be exported, neither were they exported at all material times and the applicant did not claim for any deduction of sales tax under s. 31A of the Sales Tax Act 1972, the applicant's goods did not fall under the prohibition under s. 190(4) of the Act.

**[16]** The applicant submitted that the respondent had clearly failed to consider the fact that the above conditions were all met by the applicant. It was also submitted that in interpreting taxing statutes, the decision of the Supreme Court in *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1993] 4 CLJ 339; [1994] 1 MLJ 99 held that one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

**[17]** However, the respondent took into account irrelevant factors in coming to its decision.

*Illegality*

**[18]** The applicant submitted that the respondent's decision is *ultra vires*, illegal, void, unlawful and/or in excess of authority. This is because, the GST Act requires that for a special refund claim to be successful, the applicant must meet the requirements stated in ss. 190 and 191. According to the special refund audit certificate prepared by the independent auditors engaged by the applicant, it is certified that the applicant had prepared their special refund information and documents for the purpose of their special refund application in accordance to ss. 190 and 191 of the GST Act. These documents were submitted to the respondent. Since the applicant has met all the requirements as listed under ss. 190 and 191 of the GST Act, the applicant should be entitled to the special refund claimed for sales tax paid. Therefore, it is unlawful for the respondent to reject the special refund claim made by the applicant.

**[19]** Further, the respondent had clearly failed to consider the following relevant factors and considerations in arriving at its decision.

(a) To take into consideration that the applicant had clearly fulfilled all the requirements stated in ss. 190 and 191 of the GST Act and therefore, ought to qualify for the sales tax refund.

(b) To take into consideration the special refund audit certificate prepared by independent auditors which confirms that the applicant had prepared the special refund information in all material aspects, in accordance to ss. 190 and 191 of the GST Act.

(c) To take into consideration the invoices and bill of ladings for imported goods which prove that the applicant is the importer and the consignee of goods for which sales tax has been paid.

(d) To take into consideration the invoices and delivery orders for locally purchased goods which prove that the applicant is the recipient and is in possession of the locally purchased goods where sales tax has been paid.

(e) To take into consideration of the payment vouchers for all goods purchased which prove that the applicant had successfully made the payments which include sales tax that has been charged.

*Irrationality / Unreasonableness*

**[20]** Further, it was submitted that the respondent had exercised his authority mechanically without applying his mind to the facts and circumstances of the case. The reasons are as follows:

(a) Although the applicant's special refund application clearly fall within the requirements of ss. 190 and 191 of the GST Act, the respondent had arbitrarily rejected the said application without providing any substantial basis or reason;

(b) The respondent would not have come to a conclusion that the applicant is not the owner of the goods if he had perused all the documentation provided by the applicant, of which clearly display the fact that the applicant is indeed the legal and rightful owner of the same at all material times;

(c) Had the respondent done that, he would have arrived at the conclusion that the applicant is entitled to a special refund of sales tax;

(d) The respondent should focus carefully upon the relevant provisions under the GST Act and identify the provisions which form the requirements for a sales tax special refund. Instead of arbitrarily rejecting the applicant's special refund application, the respondent ought to have given the applicant reasonable opportunity to satisfy the respondent that the stock held in hand as of 31 March 2015 are entitled to a sales tax special refund; and

(e) The paramount question always is one of interpretation of ss. 190 and 191 of the GST Act and its applicability to the facts of the case, where the respondent had clearly failed to do so.

**[21]** Based on the above grounds, the applicant submitted that the respondent had clearly misinterpreted the regulations and had exercised its power unreasonably and without due consideration. Public interest demands that a statutory power must be exercised reasonably and with due consideration (See: *Alcatel-Lucent Malaysia Sdn Bhd & Anor v. Ketua Pengarah Hasil Dalam Negeri* [2011] 4 CLJ 142; [2011] MSTC 30-028 (HC)

**[22]** In the circumstances, the applicant pray that this application be allowed and for the respondent's decision to be quashed.

**Respondent's Submission**

**[23]** Respondent submitted that the present case is the first case in Malaysia where challenge was made against the decision of the respondent in rejecting a special refund claim under ss. 190 and 191 of the GST Act, thus no clear authorities on the issue in question.

**[24]** Be that as it may, if this matter is proceeded, the respondent's submission is focus on the provision under s. 191(3) of the GST Act which says that the claimant shall not be entitled to a special refund and the officer of goods and services tax may refuse such claim where any information on the claim provided by the claimant is found to be false, inaccurate, misleading or misrepresented.

**[25]** In the present case, the respondent contended that the applicant's application for special refund had been audited in accordance with "Perintah Tetap Pematuhan Bilangan 7" on 17 February 2016 at the applicant's business premise by the audit officers of the respondent. The purpose of this audit is to ensure that all application received for the special refund fulfil the requirement under s. 190 of the GST Act and to verify that all claims made for special refund are correct and accurate. For audit purposes, a total of ten samples from the 62 stock keeping units (SKU) has been selected for this invoice with sales tax method, which involves 61.778% sampling. From this audit, it was discovered that there are information on the special refund claim provided by the applicant that is inaccurate. Based on the audit conducted by the audit officer of the respondent, it is discovered that there are information in the claim that are misrepresented. Therefore, based on this audit assessment, the applicant's claim for special refund had been rejected.

**[26]** The respondent submitted that the applicant's contention that the applicant has met all the requirements as listed under ss. 190 and 191 of the GST Act, the applicant should be entitled to the special refund claimed for sales tax paid is misconceived as the applicant fails to fulfil the requirement under s. 191(3) of the GST Act. Hence, the decision of the respondent on 10 March 2016 cannot be said to be tainted with illegality and irrationality. The respondent was not acting arbitrarily and erroneously in forming the decision that the special refund claim made by the applicant is rejected. The respondent at arriving to his decision has acted within the power conferred to him, has acted within its jurisdiction, not acted mechanically, illegally or irrationally and not in any way breached the law. *Via* the same letter, the respondent also inform that for further clarification can be given by contacting a specified email and number of the respondent.

**[27]** The applicant has failed to show grounds upon which the court can exercise its powers of judicial review or to intervene in the respondent's decision. For the above reasons, there is clearly no basis for this application and that the application is without merit at all. In the premise, the respondent's pray for this application be dismissed with costs.

**Opinion Of This Court**

*Judicial Review*

**[28]** Counsel for the applicant and the respondent had filed their written submission and made oral submissions before this court.

**[29]** At the outset, respondent submitted that in the present case, there are no clear authorities on the issue with regard to rejection of special refund claim under ss. 190 and 191 of the GST Act.

**[30]** In reply, the applicant submitted that the applicant's application for judicial review to quash the decision of the respondent is the only remedy available to the applicant. This has been stated in Schedule 4 of the GST Act 2014 (Act 762), where the applicant is prohibited from appealing to the GST

Tribunal against a decision of the respondent concerning sales tax refund. Unlike s. 99(1) of the Income Tax Act 1967 where taxpayers ought to file a notice of appeal to the Director-General of Inland Revenue Board first when it is aggrieved by a notice of assessment, the applicant here does not need to exhaust the domestic remedy of applying for a review by the respondent under the GST Act. This is on the premise that s. 124 of the GST Act clearly provides that the application for review by the Director General is merely an OPTION. Section 124(1) reads as follows:

> Any person may apply to the Director General within thirty days from the date the person has been notified of any decision made by an officer of goods and services tax for the review of the decision and **provided no appeal has been made on the same matter to the** Tribunal or **Court.** (emphasis added)

**[31]** Pursuant to the above provision, an appeal before the High Court is not discounted at all by Parliament. Taxpayers have the option of filing an application for review by the respondent or appealing to other courts. If the applicant has opted to file its appeal before the High Court, then the applicant is excluded from filing an application for review. A similar provision in the Customs Act 1967 ie, s. 141N received judicial consideration (See *Uni-Charm (M) Sdn Bhd v. Ketua Pengarah Kastam* (Judicial Review No.: R2-25-208-11-14) where the court granted leave for judicial review to the taxpayer and agreed with its submission that despite the existence of the Customs Appeal Tribunal, s. 141N provides the taxpayer with the option of either pursuing its appeal before the Tribunal or the High Court. Section 141N of the Customs Act 1967 reads as follows:

> (1) Where an appeal is lodged with the Tribunal and the appeal is within the jurisdiction of the Tribunal, the issues in dispute in such appeal, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless:
>
> (a) **the proceedings before the court were commenced before the appeal was lodged with the Tribunal**; or
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> (b) the appeal before the Tribunal is withdrawn, abandoned or struck out.
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> Where paragraph (1)(a) applies, the issues in dispute in the appeal to which those proceedings relate, whether as shown in the initial appeal or as emerging in the course of the hearing, **shall not be the subject of proceedings between the same parties before the Tribunal** unless the appeal before the court is withdrawn, abandoned or struck out. (emphasis added)

**[32]** Premised on the above, there is nothing to prohibit the applicant under the GST Act to challenge the decision by the respondent dated 10 March 2016 in rejecting the applicant's application for special refund for sales tax paid. I agree with the applicant.

*The Grounds*

**[33]** In this application, three grounds were raised by the applicant in the statement filed pursuant to O. 53 r. 3(2) of the ROC 2012. The applicant claimed that the respondent had erroneously and arbitrarily rejected the applicant's application for a special refund for sales tax paid pursuant to ss. 190 and 191 of the Goods and Services Tax Act 2014 ("special refund application"):

(a) Illegality: The respondent's decision on 10 March 2016 is *ultra vires*, illegal, void, unlawful, lack of jurisdiction and/or in excess of authority.

(b) Irrationality/unreasonableness: That it is so unreasonable that no reasonable person could have come to that decision.

(c) Legitimate expectations: The respondent's decision notwithstanding the clear provisions stated in ss. 190 and 191 of the GST Act constitutes a denial of the legitimate expectations of the applicant that the respondent will take cognizance of the said legal provisions.

**[34]** However, in the applicant's written submission, only two grounds were submitted by the applicant ie, on 'illegality' and 'irrationality'/ unreasonableness. The legitimate expectation ground was not submitted.

**The Law**

**[35]** It is trite law that the principles of unreasonableness, or irrationality, is also known as the "*Wednesbury* principle", derived from the celebrated case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223. In short, it is a situation where the public authority has acted so unreasonably that no reasonable authority would have made such a decision.

**[36]** In *Wednesbury (supra)*, Lord Greene M.R. had gone to great length in elaborating on the meaning of "unreasonable". At p. 229, His Lordship stated:

> It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short v. Poole Corp* (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith …

**[37]** In *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417, the Malaysian Supreme Court had considered this concept and explained at pp. 421 and 422 that there are generally two categories of unreasonableness, both of which can be classified as the *Wednesbury* type of unreasonableness:

(a) comprehensive unreasonableness, ie, where a person entrusted with a discretion who must properly direct himself in law fails to call to his attention matters which he is bound to hear and conclude from his consideration irrelevant matters; and

(b) unreasonableness with reference to a decision which no reasonable body of persons could have made.

**[38]** The concept of *Wednesbury* unreasonableness was reconsidered by the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, where it was termed "irrationality". Lord Diplock at pp. 410-411 described irrationality as applying 'to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it'.

**[39]** The decision in *Council of Civil Service Unions (supra)* was accepted in *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 where Edgar Joseph Jr at p. 172 (CLJ); p. 187 (MLJ) quoted Lord Diplock:

> By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* (1948) 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* (1956) AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision-maker. "Irrationality" by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

**[40]** In order to determine whether a decision of a public authority is reasonable or not, is the court in a position to put itself in the shoe of the said public authority and set up its own view that the decision made was unreasonable?

**[41]** This question has been dealt with in *Wednesbury (supra)* where Lord Green MR stated at pp. 230:

> It is clear that the local authority is entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. *It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere* … I think MR. Gallop in the end agreed that his proposition that the decision of local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. *It is not what the court considers unreasonable, a different thing altogether.* If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind … *The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authorities that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.*

At p. 233:

> … that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is *prima facie* within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose. Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is the proper and legitimate thing which the council or the licensing authority can and ought to have in mind. *He certainly does not suggest anywhere that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority has properly taken into consideration a matter of public interest such as, in the present case, the moral and physical health of children, there is, it seems to me, nothing in what Atkin J. says to suggest that the court could interfere with a decision because it took a different view as to what was in the public interest.* It is obviously a subject in which different minds may have different views. (emphasis added)

**[42]** The above-quoted passage clearly explains that the court cannot set up its own view as to what is reasonable and what is not. It is not supposed to be an arbiter of the correctness of one view over another, or substitute itself for the public authority. Firstly, what it must do in order to determine the reasonableness of a decision is to look whether in making the said decision, the public authority had gone beyond the four walls of its jurisdiction. In other words, it can only interfere if it is shown that the authority has contravened the law. And the authority is said to be contravening the law if it has taken into account matters which it ought not to take into account, or it has not taken into account matters which it ought to take into account.

**[43]** Secondly, the court can also interfere if, the public authority, despite conforming to the requirements of the law, has come to a decision so unreasonable that no reasonable authority could ever have come to it.

**[44]** In *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725; [1998] 1 MLJ 224, the same *Wednesbury* principle was adopted where it was held that there can only be interference from the court when the impugned decision is made illegally or irrationally or where there is procedural impropriety.

**[45]** Therefore, the issue in this case is whether the respondent in forming the decision on 10 March 2016 that the special refund claim made by the applicant is rejected has acted within the power conferred to him, has acted within its jurisdiction, not acted mechanically, illegally or irrationally and not in any way breached the law.

*Whether The Respondent's Decision On 10 March 2016 Is Ultra Vires, Illegal, Irrational, Void, Unlawful, Lack Of Jurisdiction And/Or In Excess Of Authority*

**[46]** The applicant contention is that the respondent had failed to take into account relevant matters in arriving at his decision. It was argued that since the applicant has met the entire requirement as listed under ss. 190 and 191 of the GST Act, the applicant should be entitled to the special refund claimed for sales tax paid.

**[47]** For ease of reference, ss. 190 and 191 of the GST Act 2014 (Act 762) is shown below which provides that:

**190 Special refund of sales tax for goods held on hand**

(1) A person is entitled to a special refund equal to the amount of sales tax in respect of the goods held on hand subject to the following conditions:

(a) the claimant is a registered person under section 20 as the effective date;

(b) the claimant on the effective date holds goods for the purposes of making a taxable supply;

(c) the goods are taxable under the Sales Tax Act 1972 and the sales tax has been charged to and paid by the claimant; and

(d) the claimant must hold the relevant supplier's invoice proving that the claimant is the recipient for which sales tax has been charged or import documents proving that the claimant is the importer, consignee or owner for which sales tax has been paid.

(2) In the case where:

(a) the goods are purchased from suppliers other than a licensed manufacturer;

(b) the goods are taxable under the Sales Tax Act 1972; and

(c) the invoice held by the person for the goods purchased does not show that the sales tax has been charged,

he is entitled to a special refund equal to twenty per cent of the value of the goods the holds on the effective date as ascertained from the invoice multiplied by the applicable sales tax rate subject to the following conditions:

(A) the claimant is a registered person under section 20 as at the effective date;

(B) the claimant on the effective date holds goods for the purposes of making a taxable supply; and

(C) the claimant has paid the amount as shown on the invoice.

(3) Where a claim for special refund has been made under subsection (1) or (2) and subsequently the claimant returns the goods to the supplier, the claimant shall account the amount of special refund as his output tax in the return for the taxable period in which the goods are returned.

(4) The special refund shall not apply to:

(a) goods which have been capitalised under accepted accounting principles;

(b) goods which have been used partially or incorporated into some other goods;

(c) goods held for hire, goods held for other than business use and goods not for sale or exchange;

(d) goods on which sales tax has been paid under the Sales Tax Act 1972 before the effective date and subsequently to be exported on or after the effective date where a claim for drawback on the sales tax paid is to be made under section 29 of the same Act; or

(e) goods on which the claimant is allowed to claim for a deduction of sales tax under section 31A of the Sales Tax Act 1972.

**191 Claim for special refund**

(1) Any person who is entitled to a special refund under section 190 shall be eligible to claim once and such claim shall be made to the officer of goods and services tax in a form as the Director General may determine not later than six months from the effective date.

(2) Where the amount of special refund under subsection (1) is:

(a) less than ten thousand ringgits, the claimant shall furnish to the officer of goods and services tax an audit certificate signed by a chartered accountant certifying the amount of special refund; or

(b) ten thousand ringgit or more, the claimant shall furnish to the officer of goods and services tax an audit certificate signed by an approved company auditor under section 8 of the Companies Act 1965 certifying the amount of special refund.

(3) Where any information on the claim provided by the claimant is found to be false, inaccurate, misleading or misrepresented:

(a) he shall not be entitled to a special refund and the officer of goods and services tax may refuse such claim; or

(b) he shall be taken not to have been entitled to a special refund and it shall be lawful for the Director General to recover any refund which has been paid to the claimant.

(4) Subject to subsection (3), the special refund shall be refunded quarterly in equal instalments over a period of two years or any shorter period as the Director General may determine.

(5) Where a claim has been made under subsection (1), the goods shall be deemed to have been given credit for input tax and all provisions of this Act shall apply accordingly.

**[48]** In this case, it is not disputed that the applicant is registered as a person under s. 20 of the Act and entitled to apply for a special refund under ss. 190 and 191 of the Act, however under s. 191(3) of the GST Act, it also provides that the claimant shall not be entitled to a special refund and the officer of goods and services tax may refuse such claim where any information on the claim provided by the claimant is found to be false, inaccurate, misleading or misrepresented.

**[49]** It is not disputed that the applicant had submitted its application for a special refund under the Act on 30 September 2015 enclosing all the documents marked as exhs. "CTP6", "CTP7", "CTP8", "CTP9", "CTP10" and "CTP11" in respect of the sales tax paid for stock held in hand as of 31 March 2015 with a total claim of RM40,366.32 in respect of 62 goods purchased or imported by the applicant. It is not disputed that the applicant's application for special refund had been audited on 17 February 2016.

**[50]** The respondent contended that the audit was conducted in accordance with respondent's internal guideline "Perintah Tetap Pematuhan Bilangan 7". A perusal of Perintah Tetap Pematuhan Bilangan 7, the purpose is to ascertain, make recommendation for approval or reject based on the audit report of the special refund claim submitted by the audit officers. The recommendation will be submitted to the GST section for their actions. It says as follows:

7. TANGGUNGJAWAB PENGARAH BPP IBU PEJABAT/KETUA BAHAGIAN PEMATUHAN (KB) NEGERI

7.1 Menyemak dan seterusnya membuat pengesyoran untuk menyokong ('approve") atau tidak menyokong ("denied") permohonan tersebut berdasarkan laporan pengauditan pembayaran balik khas yang dikemukakan oleh KC.

7.2 Pengesyoran KB tersebut akan dimajukan ke Bahagian GST untuk tindakan selanjutnya.

7.3 Memantau prestasi bulanan pengauditan tuntutan pembayaran balik khas yang dipaparkan dalam system MyGST.

**[51]** The respondent contended that for audit purposes, a total of ten samples from the 62 stock keeping units (SKU) has been selected for this invoice with sales tax method, which involves 61.778% sampling. From this audit, it was discovered that there are information on the special refund claim provided by the applicant that is inaccurate. Therefore, based on this audit assessment, the respondent rejected the applicant's claim for special refund.

**[52]** Having perused the affidavit evidence of the respondent, it cannot be denied that the audit was done where the outcome of the audit conducted are clearly explained. Paragraph 5 of the respondent's affidavit in reply states as follows:

a) Pemohon membuat permohonan pembayaran balik khas pada 30.09.2015 ke atas jenis tuntutan iaitu invois dengan cukai jualan (100%) bagi pembelian import dan pembelian daripada pengilang berlesen (MST Industrial System Sdn Bhd) dengan jumlah tuntutan sebanyak RM 40,366.32 untuk 62 unit simpanan stok "stock keeping unit" (SKU). Bersama-sama ini dilampirkan permohonan Pemohon secara kolektif dan ditandakan sebagai Ekshibit KHA-1.

b) Jenis pembayaran balik khas yang dibuat adalah kaedah 1 iaitu invois dengan cukai jualan melalui Borang Kastam 1 dan invois melalui belian daripada pengilang berlesen (MST Industrial System Sdn Bhd).

c) Sijil Perakuan audit pembayaran balik khas Syarikat MST Marketing Sdn Bhd telah diperakukan oleh firma audit Tay and Associates dan telah dibuat pengesahan ahli firma audit berdaftar melalui laman sesawang www.mia.org.my

d) Pegawai audit telah menerima arahan pengauditan permohonan ini pada 1.10.2015.

e) Semakan lanjut dijalankan oleh pegawai audit ke atas Appendix 1 iaitu lampiran yang diberikan dalam borang maklumat tuntutan pembayaran balik khas untuk mendapatkan sampel auditan dengan menggunakan kaedah persampelan nilai tuntutan tinggi yang telah dieskhibitkan di atas. Sebanyak 10 sampel daripada 62 unit simpanan stok "stock keeping unit" (SKU) telah dipilih bagi kaedah invois dengan cukai jualan iaitu melibatkan 61.778% persampelan.

f) Pemohon telah diminta mengemukakan dokumen sokongan berkaitan bagi tujuan pengauditan pembayaran balik khas melalui gentax rujukan L01641911808 surat bertarikh 2.10.2015 yang telah dieskhibitkan sebagai eskhibit CTP-10 di dalam Afidavit Sokongan Pemohon.

g) Pemohon mengemukakan dokumen melalui surat bertarikh 13.10.2015 yang telah dilampirkan di ekshibit CTP-11 Afidavit Sokongan Pemohon. Tetapi dokumen tersebut telah dipulangkan semasa lawatan audit dibuat pada 17.02.2016 dan Pemohon diminta mengemukakan dokumen yang berkaitan 10 sampel SKU sahaja.

h) Surat bertarikh 10.2.2016 dihantar pada 15.2.2016 melalui emel memohon dokumen ke atas 10 sampel SKU yang dilampirkan bersama surat pemberitahuan audit. Bersama-sama ini dilampirkan surat bertarikh 10.2.2016 dan ditandakan sebagai Ekshibit KHA-2.

i) Lawatan audit ke premis Pemohon telah dijalankan pada 17.02.2016 oleh pegawai audit Puan Nurulhuda binti Sulaiman dan Puan Nuraini binti Zulkefeli untuk memeriksa dan mendapatkan dokumen-dokumen berkaitan 10 sampel SKU tersebut. Temubual ringkas juga dijalankan dengan wakil Pemohon Chua Toong Pooi bagi mendapatkan maklumat lanjut mengenai operasi syarikat.

j) Lawatan pemeriksaan fizikal stok juga dijalankan pada tarikh yang sama di premis syarikat Pemohon.

k) Pada 19.2.2016 pihak Pemohon telah mengemukakan dokumen lengkap berkaitan 10 sampel SKU melalui serahan tangan. Dokumen yang dikemukakan adalah Salinan Borang K1, invois belian, packing list, dokumen bayaran, laporan kewangan diaudit, dokumen laporan stok pada 1 April 2015, laporan pergerakan stok keluar-masuk dan salinan invois jualan sebelum era GST dan cukai invois pada era GST bagi setiap 10 sampel SKU.

l) Semakan ke atas tuntutan kaedah 1 bagi 6 sampel SKU mendapati syarikat telah membuat pembayaran cukai jualan 10% melalui borang kastam 1 dimana cukai jualan sebanyak RM 17,010.42 telah dibayar.

m) Pengesahan borang kastam 1 telah dibuat melalui sistem makluman kastam dan mendapati butiran keterangan adalah sama seperti yang dikemukakan. Bersama-sama ini dilampirkan secara kolektif pengesahan borang maklumat kastam dan ditandakan sebagai Ekshibit KHA-3.

n) Pengesahan kod tariff ke atas produk tersebut juga dibuat dan mendapati glassware of glass ceramic bercukai 10%.

o) Semak silang telah dibuat di antara dokumen invois belian, borang K1 dengan dokumen pembayaran (remittance) baucer pembayaran mendapati jumlah nilai belian sama dengan pembayaran.

p) Hasil semakan ke atas sampel no. 1 melalui Borang Kastam 1 mendapati pengimportan dibuat oleh MST Industrial System Sdn Bhd Tambahan lagi, cukai jualan dituntut disalahnyata di mana jumlah dituntut lebih besar daripada yang sepatutnya. Bersama-sama ini dilampirkan secara kolektif dokumen berkaitan dan ditandakan sebagai Ekshibit KHA-4.

q) Hasil semakan (semak silang) diantara dokumen Borang Kastam 1, invois belian dengan maklumat tuntutan pembayaran balik khas ke atas sampel no. 2, no.5 dan no.8 mendapati cukai jualan dituntut disalahnyata. Cukai jualan sepatutnya adalah lebih rendah daripada jumlah yang dituntut. Bersama-sama ini dilampirkan dokumen berkaitan sampel no. 2, no. 5 dan no. 8 secara kolektif dan ditandakan sebagai Ekshibit KHA-5.

A r) Semakan fizikal stok pada lawatan audit ke atas sampel no. 3, no. 6 dan no. 9 mendapati kiraan fizikal stok tidak sama dengan laporan stok di mana jumlah kuantiti stok disemak lebih besar daripada kuantiti stok dinyatakan dalam laporan stok. Bersama-sama ini dilampirkan laporan stok dan ditandakan sebagai Ekshibit KHA-6.

B s) Semakan ke atas dokumen invois jualan ke atas sampel no. 4 pula mendapati 3 kotak telah rosak dan tidak diterima. Pembayaran kepada pembekal luar Negara dibuat hanya ke atas stok yang diterima sahaja iaitu 927 kotak. Bersama-sama ini dilampirkan dokumen berkaitan sampel no. 4 secara kolektif dan ditandakan
C sebagai Ekshibit KHA-7.

t) Hasil semakan (semak silang) diantara dokumen invois belian dengan maklumat tuntutan pembayaran balik khas ke atas sampel no. 7 dan no. 10 mendapati kuantiti dan cukai jualan yang dituntut disalahnyata di mana kuantiti dituntut lebih besar daripada kuantiti
D yang dinyatakan dalam invois belian. Bersama-sama ini dilampirkan dokumen berkaitan sampel no. 7 dan no. 10 secara kolektif dan ditandakan sebagai Ekshibit KHA-8.

u) Hasil pengauditan secara ringkas telah dibuat di dalam Lembaran Kerja Audit Tuntutan Pembayaran Balik Khas. Bersama-sama ini dilampirkan Lembaran Kerja Audit Tuntutan Pembayaran Balik
E Khas dan ditandakan sebagai Ekshibit KHA-9.

v) Permohonan Pemohon telah ditolak kerana maklumat tuntutan tersebut disalahnyatakan selaras dengan seksyen 191(3) Akta Cukai Barang dan Perkhidmatan 2014.

F w) Pemohon dimaklumkan mengenai keputusan penolakan pembayaran balik khas pada 10.03.2016.

**[53]** Based on the audit conducted by the audit officer of the respondent on the ten sample items selected from Form K, purchase invoices, packing list, payment vouchers, financial audit report, stock report documents as at
G 1 April 2015, movement of stocks report and sales invoices before GST comes into force submitted by the applicant, the respondent discovered the information in the claim are misrepresented. I have no hesitation in believing what has been stated in the respondent's affidavit in reply is true. Exhibit "KHA9" (Lembaran Kerja Audit Tuntutan Pembayaran Balik Khas) is the summary of the audit done on the ten sample items. Audit finding is a finding
H of fact or assessment on the documents to ensure that all application received for the special refund fulfil the requirement under s. 190 GST Act and to verify that all claims made for special refund are correct and accurate. Therefore, in my view, the audit finding is the statutory requirement and it must be accepted as true and this court shall not interfere with such finding.
I Be that as it may, exh. "KHA9" *per se* shows some inaccuracies in the price of goods quoted by the applicant in some items which did not tally with the audit finding.

**[54]** Therefore, based on this audit assessment, the applicant's claim for special refund had been rejected. The rejection has been explained by the respondent at the following para. 14 of respondent's affidavit in reply:

> a) Permohonan Pemohon untuk pembayaran balik khas telah ditolak kerana maklumat tuntutan Pemohon telah disalahnyatakan selaras dengan seksyen 191(3) Akta GST. Oleh yang demikian Pemohon tidak berhak kepada pembayaran balik khas dan tuntutan boleh ditolak.
>
> b) Butiran salahnyata dalam maklumat tuntutan Pemohon telah diperincikan di dalam perenggan 5(p) hingga (u) di atas.
>
> c) Pemohon tidak memenuhi semua syarat-syarat yang dinyatakan dalam Seksyen 190 dan 191 Akta GST sepertimana yag dinyatakan di mana di bawah seksyen 191(3) menerangkan bahawa tuntutan Pemohon boleh ditolak jika mana-mana maklumat mengenai tuntutan bayaran balik khas yang disediakan oleh Pemohon telah disalahnyatakan.
>
> d) Keputusan Responden dibuat selaras dengan undang-undang, sah, wajar serta di dalam bidangkuasa Responden.

**[55]** Based on the evidence, I found the decision of the respondent cannot be said to be tainted with illegality and irrationality. The respondent was not acting arbitrarily and erroneously in forming the decision that the special refund claim made by the applicant is rejected.

**[56]** The Federal Court in the case of *Malaysia Airline System Bhd v. Wan Sa'adi Wan Mustafa* [2015] 1 CLJ 295, cited with approval an earlier ruling of the former Supreme Court in *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 with emphasis on the following observation by Jemuri Serjan SCJ (as he then was):

> Unreasonableness here, in our view, was used in the context of the broad sense of that term as expounded by Lord Greene MR in the case of *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) KB 223. "Reasonableness" here embraces the various heads of *ultra vires* – such as misdirecting oneself in law, taking into account irrelevant considerations – which is now known as the ***Wednesbury*** principles … (emphasis added)

**[57]** The Federal Court in the above case further affirmed that a decision could also be considered manifestly unreasonable if no body of persons could have reached it, and that in order to come to such conclusion, there must be overwhelming evidence to support it.

**[58]** In the present case, the respondent had taken into account all matters which it ought to take into account in coming to its decision. The applicant's contention is that the special refund audit certificate prepared by the independent auditors engaged by the applicant for the purpose of their special refund information and documents for the purpose of their special refund application is in accordance to ss. 190 and 191 of the GST Act and therefore,

A it should be accepted under the law. I found this contention is without merit and a blatant disregard to s. 191(3) of the Act which provides that any information on the claim provided by the claimant is found to be false, inaccurate, misleading or misrepresented, he shall not be entitled to a special refund and the officer of goods and services tax may refuse such claim. In B order to establish the claim to be correct and accurate, it must go through an audit exercise. I agree with the respondent that the respondent cannot rely solely on the certification from the independent auditors engaged by the applicant.

**[59]** The most pertinent fact is that there is an internal mechanism such as an audit conducted by the officer of the respondent to certify the claim. The C audit was done and the respondent had followed their internal guidelines and the audit report which contains the recommendation was submitted to GST section for their action. The respondent when making a decision relies on the recommendation made to him based on the audit report. With the recommendation, he would have before him all relevant information relating D to the special refund claim. Upon all these matters placed before him, the respondent would decide as to whether the recommendation is to be approved or not.

**[60]** Therefore, the applicant's contention that the applicant has met all the requirements as listed under ss. 190 and 191 of the GST Act, the applicant E should be entitled to the special refund claimed for sales tax paid cannot hold water as the applicant fails to fulfil the requirement under s. 191(3) of the GST Act.

*Whether There Is A Denial Of The Legitimate Expectations Of The Applicant?*

F **[61]** This issue is not submitted in the applicant's written submission but is one of the grounds in the judicial review application. However, based on the applicant's documents for the special refund application it can be argued that the same clearly reflect that the applicant is entitled to the special refund.

**[62]** My view is that the issue of legitimate expectations did not arise in this G case for the simple reason that the applicant had failed to fulfil the requirements stated in s. 191(3) of the GST Act, therefore his claim for special refund had been correctly rejected.

**[63]** In the case of *Krishnandas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636 the words of Gopal Sri Ram JCA is very clear in that:

H

> The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases.

I

## Decision

**[64]** It is my conclusion that the respondent in arriving at his decision has acted within the power conferred to him, has acted within its jurisdiction, not acted mechanically, illegally or irrationally and not in any way breached the law. The applicant has failed to show grounds upon which this court can exercise its powers of judicial review or to intervene in the respondent's decision.

**[65]** For the above reasons, the applicant's application is dismissed with costs.